Anthony and Karney Scioscia d/b/a Home & Industrial Disposal Service and Fanwood Disposal Service and Teamsters Local 945 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 22-RC-8600

## February 3, 1983

## **DECISION AND DIRECTION**

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director for Region 22 on September 4, 1981, an election by secret ballot was conducted on September 30, 1981, under his direction and supervision among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that there were approximately 11 eligible voters and that 11 ballots were cast, of which 6 were for, and 5 against, the Petitioner. There were no challenged or void ballots. Thereafter, the Employer timely filed objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on October 28, 1981, issued and duly served on the parties his Report on Objections. He recommended that the Employer's two objections be overruled in their entirety. Thereafter, the Employer timely filed exceptions to the Regional Director's report.

Upon the entire record in this case, the Board finds:

- 1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
- 2. The labor organization involved claims to represent certain employees of the Employer.
- 3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
- 4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All drivers and helpers employed by the Employer at its Plainfield, New Jersey location, excluding all mechanics, office clerical employees, guards and supervisors as defined in the Act.

5. The Board has considered the entire record in this proceeding, including the Employer's objections, the Regional Director's report, and the Employer's exceptions and brief, and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.<sup>1</sup>

The Employer alleged in Objection 1, in pertinent part, that an official of the Petitioner made threatening statements to employees approximately 1 hour before the election. In support of this objection, the Employer proffered evidence indicating that an agent of the Petitioner threatened employees that if anyone helped the Employer in a strike, they would be "made an example of," and added that, during the Petitioner's last strike, the Petitioner had a talk with an individual who "worked both sides of the fence," and the individual was "still in the hospital."2 Citing Hickory Springs Manufacturing Company, 3 the Acting Regional Director concluded that the alleged statements involving strikes were, prima facie, unobjectionable, noting that: "[T]hreats made by a union which relate past or possible future conduct of the union are insufficient to set aside an election. For an election to be set aside, the Board has held, threats made by a union must be directed to the outcome of the election and not toward certain [actions] taken previously or speculation as to what will occur in the future."

In Hickory Springs, union officials allegedly made or adopted numerous statements, including the following, which purported to illustrate the type of treatment employees could reasonably expect if they opposed the union during a strike: if there were a strike and anyone crossed the line, they should be "taken out and have the dog—beat out of them"; in the event of a strike, if company trucks were caught on the road, there were lots of teamsters and anyone pulling a load would find themselves in a gully; anyone who crossed the line would "get it"; if there was any stomping done, he (the speaker) would be in the middle of it. After considering these alleged remarks, the Board, in Hickory Springs, 4 concluded:

None of the above statements allegedly made or adopted by the union officials involves any threat, or even hint of threat, towards employees based on how they would vote in the upcoming election. Thus the re-

4 239 NLRB at 641.

<sup>&</sup>lt;sup>1</sup> In the absence of exceptions thereto, we adopt, *pro forma*, the Regional Director's recommendations that the portion of Objection 1 regarding the housing of other employers' trucks, and Objection 2, be overruled.

<sup>&</sup>lt;sup>2</sup> After the election, the Petitioner's agent allegedly stated that there are "five guys against us that we have to watch out for." Since this statement was alleged to have been made after the election, we agree with the Acting Regional Director that it could not have had any impact on the election and, therefore, cannot constitute grounds for setting the election aside.

<sup>&</sup>lt;sup>3</sup> 239 NLRB 641 (1978), affd. in the summary judgment proceeding 247 NLRB 1208 (1980), enf. denied 645 F.2d 506 (5th Cir. 1981).

marks neither relate to events surrounding or concerning the election nor were they calculated to coerce employees to vote for the Petitioner.<sup>5</sup> It is also clear from the context of the remarks that they did not relate to a possible strike before the election but were made wholly in reference to some unspecified time in the future after the Petitioner became the employees' bargaining representative and a strike was called.<sup>6</sup> In short, the alleged remarks assumed union representation at the time the threatened action would occur.

The Board reasoned that there was "little if any likelihood of the statements having any immediate coercive impact on the employees and the election results." 5

In refusing to enforce the Board's Order, the court of appeals observed:<sup>6</sup>

Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones.

Consistent with the position taken by the circuit court, we believe it unrealistic to conclude that a union agent's threats of bodily harm, damage to personal property, or the like, cannot, as a matter of law, impact on an election merely because the threat in question is couched in terms of possible future conduct. Such an approach does not take into account the tendency of such threats to have a substantial and destructive effect on free and open campaign discussion, as well as freedom of choice at the polling place itself. A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is sub-

stantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process. It can hardly be gainsaid that an employee faced with union threats of personal injury will think twice before pinning on a "vote no" button or passing out antiunion literature. A union can, by stilling the voices of just a few employees who oppose it, successfully paint a false picture of its support among the electorate and thereby influence the votes of those employees who find themselves undecided. Such threats may well have an additional indirect effect on other workers who might have been swayed against the union, had the voices of all employees been heard. Moreover, in any given case, depending on the number, nature, and severity of the threats involved, some employees who are either uncertain, or otherwise opposed to the union, will likely be inclined to opt for the safety of capitulation and decide to cast their lot with the union—the secrecy of the ballot box notwithstanding. Accordingly, Hickory Springs Manufacturing Company, Inc., is hereby overruled.7

We cannot conclude, as a matter of law, that if the threats alleged herein were made, the tenor, effect, and contingent nature of which were similar to those in *Hickory Springs*, they were so remote as to have had no effect on the election. To the contrary, we find that the allegations in Objection 1 pertaining to union threats of violent reprisals for refusing to cooperate with the Petitioner during a strike, if found to be true, constitute grounds for setting aside the election.

In this connection we note that the unit of approximately 11 employees was small and, though not controlling, that the election was decided by a single vote. Allegedly, the conduct occurred on the Employer's property within an hour of the election. Responsibility, according to the Employer, did not lie with an overzealous employee, but with an official of the Union itself. The union official, as noted previously, allegedly threatened that anyone who helped the Employer in a strike would be "made an example of." Rather than leave it to chance whether employees would take his remarks seriously, the evidence adduced by the Employer indicates that the official punctuated his threat with historical fact, i.e., an individual who refused to toe the line during the Union's last strike was "still in

<sup>&</sup>lt;sup>8</sup> Indeed, such statements would more likely have the opposite effect, if any at all, on employees who eschew violence.

<sup>&</sup>lt;sup>6</sup> There is not the slightest hint that the Petitioner or the employees intended to engage in a strike prior to the election.

<sup>6 239</sup> NLRB at 642.

 <sup>645</sup> F.2d at 510. Accord: Loose Leaf Hardware v. N.L.R.B., 666 F.2d 1036 (6th Cir. 1981).

<sup>&</sup>lt;sup>7</sup> In overruling Hickory Springs, we return to the approach taken by the Board in Provincial House, Inc., 209 NLRB 215-216 (1974), wherein the Board stated that threats of picket line violence in the future "[create the] impression that the Union could, and would, resort to whatever means—lawful or unlawful—[which] might be required effectively to exercise its power over employees. We do not believe that threats of this kind of raw exercise of power are consistent with the atmosphere necessary for the conduct of a free and fair election."

the hospital." Inherent in statements such as these is the simple, unambiguous message that opposing the Union could be a very dangerous course for employees to pursue. If made, these statements would have destroyed the conditions for a free and fair election. Therefore, we will direct that the portion of Objection 1, which alleged that the Petitioner made threatening statements to employees concerning the violent ramifications associated with employees' refusing to cooperate with it during a strike, be set for hearing.

## DIRECTION

It is hereby directed that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the portion of Objection 1 pertaining to the Petitioner's alleged threats of violent reprisals against employees who refuse to cooperate with it during a strike.

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said portion of Objection 1. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER DIRECTED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 22 for the purpose of arranging such hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

## MEMBER JENKINS dissenting:

The majority overrules *Hickory Springs*,<sup>8</sup> where the Board held that threats which are not directed at the outcome of an election did not warrant setting aside the election. Relying on that decision, the Regional Director overruled the Employer's objection that alleged threats by the Petitioner interfered with the election in this case.

The Employer asserted that the Petitioner's agent had threatened that anyone helping the Employer in a strike would be "made an example."

The same agent purportedly added that during its last strike the Petitioner had a talk with an individual who "worked both sides of the fence" and was "still in the hospital." The Regional Director concluded that these statements were not directed at the election and, therefore, were not a sufficient basis, as a matter of law, to set aside the election.

The majority baldly asserts that a union's implied threat of violence in the problematical event of a strike, at some future time, after a yet unconsummated and hypothetical union victory, and a still more remote and conjectural failure to honor that strike, creates a "substantial likelihood that employees will be inhibited from expressing their actual views, and . . . jeopardizes the integrity of the election process." I reject that assertion.

I refuse to join in the majority's blind leap of faith. I cannot equate rhetoric directed toward a union's ability to prevent strikebreaking, in the event of an election victory and a subsequent strike, with threats aimed at securing an election victory in the first place. The bridge between the two is nothing more than the majority's will that it should be so. That is not enough, and is in marked contrast to their disregard for protecting our electoral process evidenced by their decisions in Midland National Life Insurance Company, 263 NLRB 127 (1982), and Affiliated Midwest Hospital Incorporated d/b/a Riveredge Hospital, 264 NLRB 1094 (1982), to repudiate the Board's role in policing election misrepresentations and jealously guarding its neutral image.

It is a disservice and inaccurate to assert that employees tilt at windmills and shy at shadows. Employees are fully as capable of distinguishing between a present threat to personal safety and blustering campaign talk aimed at bolstering a union's image of its ability to bring effective pressure to bear against an employer in the event of a union victory and a possible subsequent strike. Principles of criminal law recognize this ability to distinguish such remote and conditional blusters from present threats, and hold them to constitute no provocation of or defense to unlawful conduct which they allegedly induce. As we noted in Hickory Springs, supra, an employee made genuinely afraid by a union's claim to violent propensities during strikes would avoid the risk by voting against the union in the anonymity of the Board's secret-ballot election. To hold that elections may be set aside on this tenuous, conjectural basis lacks logical support.

I continue to adhere to the sound principles of *Hickory Springs* and I would certify the Petitioner as the representative in this case.

<sup>&</sup>lt;sup>8</sup> Hickory Springs Manufacturing Company, 239 NLRB 641.